



# Office of the Anti-Discrimination Commissioner

*Celebrating Difference, Embracing Equality*

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22 December 2008

Peter Hallahan  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs

## **Re: Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008**

Thank you for the invitation to make a submission to the aforementioned  
Parliamentary inquiry.

The Office of the Anti-Discrimination Commissioner (OADC) administers the *Anti-Discrimination Act 1998 (Tas)* (the ADA). The ADA was the last piece of Anti-Discrimination legislation passed in Australia, so while it was delayed in its implementation, it arguably represents the broadest legislation of its kind in Australia.

The OADC strongly supports the removal of the 'dominant purpose test' from the *Age Discrimination Act 2004 (Cth)*. The OADC is of the view that the 'dominant purpose test' sanctions discrimination and makes it more difficult for parties to determine whether age is the dominant reason for any unfavourable treatment.

Both age and disability are prescribed attributes under the ADA, amongst other attributes. It is noted that the ADA provides that for direct discrimination to take place it is not necessary that the prescribed attribute be the sole or dominant ground for the unfavourable treatment: s 14(3)(a).

The OADC will comment specifically on the key amendments proposed to the DDA.

### **Make explicit that refusal to make reasonable adjustments for people with disability may also amount to discrimination**

The OADC strongly agrees that there should be a positive obligation to make adjustments for people with disability. This would represent an important change to the discrimination provisions in the *Disability Discrimination Act 1992 (Cth)* (the DDA), by clarifying statutory obligations. In turn, this change will enhance protection against disability discrimination in the community.

It is important in the view of the OADC that the proposed amendment regarding reasonable adjustment in s 13 Subsection 4(1) be inserted, namely

***reasonable adjustment***: an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

The OADC is of the view that the above definition makes it clear that adjustments must be made for persons with a disability, unless the adjustment would cause unjustifiable hardship. The OADC supports this approach.

Accordingly, the OADC supports the new subsections 5(2) and 6(2), which incorporate this positive duty to make reasonable adjustments in both the direct and indirect disability discrimination provisions.

It is noted that such a provision is not currently contained in the ADA.

**Make the defence of unjustifiable hardship available in relation to all unlawful discrimination on the ground of disability, except harassment and victimisation**

The OADC is of the view that this amendment represents a fairer and more equitable approach. Moreover, this amendment may have the effect of addressing some of the issues raised by the High Court decision of *Purvis v New South Wales Department of Education and Training* (2003) 202 ALR 133 (*Purvis*).

In the decision of *Purvis*, a student, Daniel, was excluded from a school due to violent behaviour. The majority of the High Court held that Daniel's behaviour formed part of the circumstances in which the school made its decision about him. It was held that while the school treated Daniel as it did because of his disability in that the disability caused the violence, it did not treat him less favourably than it would have treated a student without a disability in the same circumstances (i.e. exhibiting violent behaviour).

The majority considered that the words 'in the circumstances that are the same or are not materially different' in s 5 of the DDA allow the court to impute the complainant's behaviour to the hypothetical comparator.

McHugh and Kirby JJ (dissenting) expressed the view that the limited operation of unjustifiable hardship in the DDA is an anomaly requiring correction by Parliament [at 175].

In a case note prepared by Kate Rattigan: "A Case for Amending the *Disability Discrimination DDA 1992 (Cth)*", Melbourne University Law Review, 2004<sup>1</sup>, Ms Rattigan offered the view that the majority imported considerations of health and safety into the definition of direct discrimination. Ms Rattigan argued that this is due to the lack of an adequate defence to discrimination relating to the health, safety and welfare of others.

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1. <http://beta.austlii.edu.au/au/journals/MULR/2004/17.html>

Ms Rattigan concluded that the majority approach was due to the absence of an appropriate and applicable defence or exception, such as unjustifiable hardship, in respect of post admission events at schools.

Ms Rattigan proposed that Parliament should strengthen the defences in the DDA by extending the defence of unjustifiable hardship to cover events following admission to a school. Further, Ms Rattigan recommended that State laws relating to occupational health and safety should be prescribed because compliance with occupational health and safety laws are not prescribed for the purposes of this defence in the DDA: s 47(2).

The OADC agrees with the views of Ms Rattigan in relation to the need for adequate defences, namely that of unjustifiable hardship. The OADC notes that s 47(3), which restricted the application of the DDA so that during the first 3 years of operation, a person acting in direct compliance with another law is not liable for disability discrimination, is now redundant as the period in which it was to operate has expired (page 17 of the Explanatory Memorandum).

The OADC is of the view, as will be discussed further, that broadening the application of the defence of unjustifiable hardship is sufficient to address the issues raised by *Purvis*.

The OADC seeks to raise a further matter arising from the decision of *Purvis* regarding the approach to the comparator in the context of direct discrimination.

As noted, the majority in *Purvis* held that the comparator is with a student without the disability who engages in violent behaviour. McHugh and Kirby JJ (dissenting) took the view that the approach to the comparator is someone who does not have the disability or its effects – a well behaved student with no brain damage. Otherwise, it was noted, persons suffering from those disabilities would lose the protection of the DDA. Ms Rattigan agreed with the minority on the question of the approach to the comparator. Similarly, the OADC agrees with the minority approach to the comparator in *Purvis*.

It is noted that the Bill seeks to repeal the definition of direct discrimination and substitute it with an alternative definition. Page 7, paragraph 34 of the Explanatory Memorandum states that the new subsection 5(1) contains minor modifications to improve readability and does not make substantive changes to the existing subsection 5(1).

The OADC is of the view that the comparator test should be simpler and more flexible. The OADC recommends that the definition of direct discrimination in the ADA (s 14) be adopted. According to the decision of *John Lawler v the Mercury (Davies Bros Ltd)* [2006] TASADT 7 (*Lawler*) per Tribunal Member Otlowski, s 14 of the ADA appears to be less rigid than the current definition in the DDA.

Section 14(2) of the ADA provides that: *Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed*

*attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.*

Panel Member Otlowski observed in *Lawler* that that “*the Tasmanian provision is in different terms to the relevant legislation in other Australian jurisdictions, including that under consideration by the High Court in Purvis and the New South Wales Court of Appeal in Haines. The Tribunal prefers the reasoning put forward by Mr Grueber that a more general process of evaluation and comparison is appropriate in determining whether a complainant has been treated less favourably than someone without that attribute would have been treated*” [at 151].

Panel Member Otlowski went on to say that “*the Tribunal is of the view that it needs to take a flexible and pragmatic approach to this issue of reliance on a comparator to give meaning to the intended effect of s14 such that comparison needs to be made with a person (real or hypothetical) who does not have the relevant attribute*” [at 153].

The OADC is of the view that including adequate defences in the DDA in relation to unjustifiable hardship, as outlined above, means that a respondent may be able to rely on that defence to justify excluding a complainant (eg from work or school) who engages in repeated violent behaviour, where that behaviour has not altered after the respondent has made reasonable adjustments and provided appropriate support and to provide any further adjustments would cause an unjustifiable hardship.

#### **Clarify matters to be considered when determining unjustifiable hardship**

The OADC agrees that clarifying matters to be considered when determining unjustifiable hardship is beneficial, as it will assist parties to a complaint and importantly, the courts. The OADC supports the clarification provided by the Bill in this regard.

#### **Clarify that the onus of proving unjustifiable hardship falls on the person claiming it**

The OADC supports this approach and notes that this is consistent with the operation of legal defences generally, and the exceptions relating to unjustifiable hardship contained in the ADA.

#### **Make clear that the definition of disability includes genetic predisposition to a disability and behaviour that is a symptom or manifestation of a disability**

While arguably the current definition of disability in the DDA encompasses genetic predisposition to a disability and behaviour that is a symptom or manifestation of a disability<sup>2</sup>, an amendment, which expressly includes these matters in the definition, will remove any doubt.

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<sup>2</sup> The majority in *Purvis* concluded that the definition of disability includes behaviour resulting from the disability.

**Replace the ‘proportionality test’ in the definition of indirect discrimination with the requirement to prove that the condition or requirement imposed has the effect of disadvantaging people with the disability of the aggrieved person**

The OADC supports the above replacement as it improves the test for indirect discrimination.

However the OADC is of the view that the terms could be simplified further by removing the references to *comply* from the proposed definition of indirect discrimination, such that s6(1)(b) reads: *that the requirement or condition disadvantages the aggrieved person.*

The above amendment would be more in line with the ADA.

**Shift the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with the disability to the respondent**

The OADC agrees with this approach because if a person is arguing that a requirement is reasonable, then it is essentially a defence and accordingly the onus of proof should shift to the person claiming it. The OADC is of the view that this amendment will improve the DDA and notes that it would be more progressive than the ADA in Tasmania, at least in this respect.

**Extend the power to make standards under the Act**

The OADC has no objection to this.

**The bill also seeks to assist people with assistance animals and service providers by recognising animals accredited either under a State and Territory law or by a relevant organisation, and by clarifying each party's obligations. The bill also consolidates the provisions in the Act relating to carers, assistants and aids, and addresses the issues raised by the Full Federal Court in *Forest* [2008] by clarifying that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability**

The OADC strongly agrees that people with assistance animals or carers should be protected by the DDA and that this should be clear to avoid any doubt.

I trust that this is of assistance in this inquiry.

Should you require clarification on this submission, please do not hesitate to contact Catherine Edwards, the Complaints Manager.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'S Bolt', followed by a horizontal line.

Sarah Bolt  
**Anti-Discrimination Commissioner**